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Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

No. 95-355

In the

Supreme Court of the United States

October Term, 1995

Kathleen McKown, William McKown,
Mario Tosto, and Quinna Lamb,

Petitioners,

vs.

Douglass G. Lundman, as trustee
for the next of kin of Ian
Douglass Lundman, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

**MEMORANDUM IN OPPOSITION
TO THE PETITION**

James H. Kaster
Counsel of Record
Paul J. Lukas
Stephen Chippendale
Nichols Kaster & Anderson
80 South Eighth Street
Minneapolis, MN 55402

Robert J. Bruno
Robert J. Bruno, Ltd.
107 Professional Plaza
1601 East Highway 13
Burnsville, MN 55337

Attorneys for Respondent

1995 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

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On May 9, 1989, eleven-year-old Ian Lundman died of complications from juvenile on-set diabetes because he received prayer instead of insulin. (Pet. App. at 17a.)[1] In his

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[1] Citations for Petitioners' Appendix will hereinafter be made as "Pet. App. at –". Citations to the original petition for a writ of certiorari

earlier cross-petition for a writ of certiorari, Respondent Douglass G. Lundman described Christian Science treatment (Cross-Pet. at 3-5) and his son's needless suffering (Cross-Pet. at 5-6).

After a seven-week trial, a jury found all of the Christian Science defendants negligent, including Petitioners Kathleen McKown (Ian's mother), William McKown (Ian's stepfather), Mario Tosto (a practitioner listed in the *Christian Science Monitor*), and Quinna Lamb (now Giebelhaus) (a Christian Science nurse).[2] On appeal, the Minnesota Court of Appeals affirmed the jury's conclusion that Petitioners had breached their duty of care to Ian. (Pet. App. at 31a-38a, 45a-51a.) The lower court concluded:

> The undisputed facts show that Ian's caregivers failed to seek medical help in the three days leading to his death, despite continuous and dramatic indications that Ian was ill with a life-threatening disease--first seriously, then gravely--and that he would die, given continued reliance on Christian Science prayer. The undisputed facts indicate that appellants had no lawful choice but to seek medical help.

(Pet. App. at 51a.)

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will be made as "Pet. at --". Finally, citations to the cross-petition for certiorari will be made as "Cross-Pet. at --".

[2] The other defendants included The First Church of Christ, Scientist ("First Church"), located in Boston, and James Van Horn, the one-person Christian Science Committee on Publication for Minnesota. (Pet. App. at 21a.) These parties are before the Court as a result of the cross-petition.

To be sure, the lower court produced a deeply flawed opinion. (Cross-Pet. *passim*.) But none of these flaws are revealed by Petitioners in their effort to have this Court grant review. In fact, the arguments advanced by Petitioners for review of the parts of the case they lost in the court of appeals are as deeply flawed as the decision with which they quarrel.

I. PETITIONERS' "LESS RESTRICTIVE MEANS" ANALYSIS LACKS LEGAL SUPPORT

Petitioners contend that Minnesota's statutory requirement that caregivers report seriously ill children to authorities (Minn. Stat. § 626.556) is a less restrictive means for bringing about medical intervention than the common law. (Pet. at 10-22.) That Petitioners failed to test this argument in the proceedings below is evident in their lengthy, but flawed, discussion of the least restrictive means test.[3]

A. Because RFRA is unconstitutional, the least restrictive means test has no applicability to this case

As a matter of federal law, the least restrictive test only applies because of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb. Prior to RFRA's enactment, this Court held that the Free Exercise Clause cannot be used to challenge a law of general applicability unless it can be shown that the law was motivated by a desire to interfere with religion. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990). Congress enacted RFRA for the express purpose of

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[3] First Church was the only party to advance this argument in the lower courts. Petitioners have thus disregarded Rule 14(h) of this Court's Rules.

overruling *Smith* and requiring that the balancing test be applied to all laws that substantially burden religious exercise.[4]

Congress may not enact legislation that controls interpretation of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-80 (1803). That Congress exceeded its authority in enacting RFRA is apparent in the fact that the legislation denies children their fundamental right to life and equal protection simply because of their parents' religion. Indeed, a federal court has already concluded that RFRA is unconstitutional. *Flores v. City of Boerne*, 877 F. Supp. 355, 358 (W.D. Tex. 1995).

The trial court imposed liability on Petitioners by applying the reasonable person standard of negligence, a law of general applicability that is neutral toward religion. (Pet. App. at 79a, 81a, 82a-83a.) The court of appeals held that Petitioners were liable even under a negligence standard modified by religion. (Pet. App. at 48a.) The least restrictive means test is irrelevant to Petitioners' tort liability.

B. Petitioners' proposed least restrictive alternative violates the Equal Protection and Establishment Clauses

Petitioners ask this Court to construe Minnesota's child abuse reporting statute to the effect that it was intended by the legislature to be a less restrictive alternative to tort liability even though no Minnesota court has ever made such a construction. Because the reporting statute is less effective than tort liability (Pet. App. at 28a), such a construction would infringe upon children's fundamental rights and advance a par-

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[4] Importantly, the court of appeals found it unnecessary to analyze federal law because the Minnesota Constitution requires the balancing test. (Pet. App. at 27a.) The trial court held that *Smith* abolished the balancing test for laws not created to regulate religious conduct. (Pet. App. at 69a.)

ticular religious belief in violation of the United States Constitution.

1. Tort liability exemptions violate the Establishment Clause

Exempting certain individuals from general citizenship obligations because of their religious beliefs may run afoul of the Establishment Clause. *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). The long-standing test for Establishment Clause scrutiny requires, among other things, that legislation have a secular purpose and a primary effect that neither advances nor inhibits religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The religious preference promoted by exempting Christian Scientists from tort liability because of Minnesota's reporting statute serves no evident secular purpose; rather, such an exemption would have the primary effect of advancing the teachings of Mary Baker Eddy over the governmental interest in protecting children. This Court has previously rejected attempts to elevate religious interests over all others. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985).

Moreover, confining statutory benefits to only sectarian organizations has the primary effect of advancing religion. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 11 (1989). Because Petitioners do not--and cannot--argue that the Minnesota statute obviates tort liability for both religious and non-religious child abusers, their construction of the reporting statute fails to pass constitutional muster.

2. Tort liability exemptions violate Equal Protection

If a suspect classification or fundamental right is involved in governmental action that classifies individuals, the action

will be struck down unless it is necessary to achieve a compelling interest. *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984). Classifications based upon religion are suspect and thus must survive this exacting scrutiny. *McDaniel v. Paty*, 435 U.S. 618, 628 (1978).

The exemption from tort liability for specified religious groups discriminates invidiously in at least two respects. First, it discriminates among children based upon the religious beliefs of their parents or caregivers. Second, it discriminates among parents and caregivers by imposing a duty to obtain non-religious care on non-believers while allowing believers to forego medical treatment.

One is hard pressed to articulate a compelling governmental interest in allowing some children to have a lower standard of care than other children solely for religious reasons. In fact, the compelling governmental interest in preserving the life of children militates in the opposite direction. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

II. PETITIONER TOSTO'S LIABILITY IS NOT PREDICATED ON "CLERGY MALPRACTICE"

Contrary to Petitioners' assertions, Mr. Tosto's liability in this case is not predicated on "clergy malpractice." (Pet. at 22-24.) Their use of this term implies that the jury was asked to determine whether he properly carried out his duties as a Christian Science practitioner by, for example, reciting the correct teachings of Mary Baker Eddy. But no such jury instructions were given. Instead, Petitioner's actions were judged by the jury against those of a reasonable person. This Court has long recognized that religiously-motivated conduct may be evaluated in light of objective standards. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 166-67 (1878).

The court of appeals correctly recognized that a person cannot shed the duty to act as a reasonable person simply by

following his or her spiritual calling. (Pet. App. at 37a-38a.) This truism carries particular force in this case because Mr. Tosto was hired and paid almost $500 "to play a professional and pivotal role in caring for Ian." (Pet. App. at 37a.) He thus assumed a special relationship with the seriously ill child in exchange for a monetary fee.

As the decision below observed, a religiously-motivated person cannot ignore the law in blind adherence to his or her faith:

> We emphasis that the law required Tosto--as a trained Christian Science practitioner--to temper his use of Christian Science health care to conform his actions to the law of the community. Christian Science teachings direct him to follow the tenets of the religion, but, as a health-care provider, his is also required to yield to civil authority "when the law so requires."

(Pet. App. at 38a.) To find otherwise would be to open a Pandora's box. Would a Catholic priest, for example, be justified in failing to call for an ambulance for a parishoner who suffers a heart attack during religious counseling? The answer is clear: religious officials must conform their actions "when the law so requires."

III. THIS CASE DOES NOT RAISE DUE PROCESS QUESTIONS OF NATIONWIDE IMPORTANCE

Petitioners' due-process arguments fail to account for the fact that this case is a common-law negligence action. (Pet. at 24-27.) As with *every* negligence action, this case involves application of the common law--a protean source of law responsive to social needs. *Kansas v. Colorado*, 206 U.S. 46,

96-97 (1907). Negligence actions are the mirror image of criminal prosecutions. *Getter v. Travel Lodge*, 260 N.W.2d 177, 180 (Minn. 1977). Petitioners' comparison of this negligence action with the earlier criminal prosecution, *see Minnesota v. McKown*, 475 N.W.2d 63, 68 (Minn. 1991), *cert. denied*, 502 U.S. 1036 (1992), is thus the legal equivalent of comparing apples and oranges.

Petitioners' analysis is further undermined by the very statutes upon which it is built. Neither Minn. Stat. § 609.378 nor Minn. Stat. § 626.556 suggest that spiritual healing is reasonable under *all* circumstances. The statutes merely say that spiritual healing alone does not equate to criminal neglect. Civil principles of fair warning are not offended simply because Petitioners disagree with the jury's conclusion that Ian's caregivers acted unreasonably in refusing to seek routine medical assistance for the seriously ill child.

CONCLUSION

As Mr. Lundman observed in his cross-petition, this case is of "national significance." (Cross-Pet. at 14.) But its reasons for national import are found mainly in that cross-petition, not the principal petition. Therefore, this Court should either deny review *in toto* or undertake a comprehensive examination of the decision below. This Court should not grant review as to Petitioners alone.

Dated: December 21, 1995

Respectfully submitted,

James H. Kaster
Counsel of Record
Paul J. Lukas
Stephen Chippendale
Nichols Kaster & Anderson
4644 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
612/338-1919

Robert J. Bruno
Robert J. Bruno, Ltd.
107 Professional Plaza
1601 East Highway 13
Burnsville, MN 55337
612/890-9171

Attorneys for Respondent